IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GREAT NORTHERN RAILWAY COMPANY, a Corporation,
Petitioner,

vs.

THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA and EDWARD T. HYDE,
Respondents.

No. 15,975

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS

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STATUTES CITED

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STATEMENT OF THE FACTS

The petitioner (hereinafter referred to as defendant) by this proceeding seeks an order prohibiting the United States District Court for the Northern District of California from taking any action in the case entitled Edward T. Hyde, plaintiff v. Great Northern Railway Company, a Corporation, defendant, Civil Action No. 36948, and an order directing

the United States District Court for the Northern District of California to transfer said case pursuant to 28 U.S.C. 1404(a) to the United States District Court, Western District of Washington, Northern Division, sitting at Seattle, Washington.

A. The Pleadings and History of the Case.

A concise history of the pertinent facts of the case are as follows:

The plaintiff's complaint was originally filed in the United States District Court, District of Minnesota, Third Division, on February 23, 1956. The complaint states an action against defendant under the provisions of 45 U.S.C., Sections 51-60, commonly known as the Federal Employers Liability Act. The cause of action arose out of an accident which occurred November 5, 1955, in Seattle, Washington, while the plaintiff was working as a switch foreman for the defendant. The defendant served and filed its answer March 16, 1956.

The defendant served and filed a notice of motion and supporting affidavits for an order of the United States District Court, District of Minnesota, Third Division, transferring the case under the provisions of 28 U.S.C. 1404(a) to the United States District Court, Western District of Washington, Northern Division, for trial at Seattle. The plaintiff, on July 12, 1956, served and filed a notice of alternative motion that the plaintiff would oppose the transfer of the case from the District of Minnesota and, in the alternative, moved the court, in the event it determined that the District of Minnesota was not a proper venue, to transfer the case to the United States District Court, Northern District of California, Southern Division, sitting at San Francisco. The United

States District Court, District of Minnesota, Third Division, granted the plaintiff's alternative motion on August 2, 1956.

Defendant petitioned the United States Court of Appeals for the Eighth Circuit August 6, 1956, for alternative writs of prohibition and mandamus, which were subsequently issued, directing the plaintiff and the United States District Court for the District of Minnesota to show cause why said writs should not be made absolute. The returns to the alternative writs were filed and the matter was heard before the court, which filed its opinion and judgment December 18, 1956 (*Hyde v. Great Northern Railway Company,* 238 F. (2d) 852). The United States Court of Appeals for the Eighth Circuit denied defendant's application for the writs "upon the sole ground that the transfer order complained of is not reviewable by prohibition, mandamus or otherwise" and the court further held:

> "* * * we believe that there was no adequate factual or legal basis for the transfer. If the order transferring the case were subject to review for an erroneous exercise of a sound discretion, we would not hesitate to reverse the order and direct the District Court to transfer the case to Seattle, * * *."

A petition for rehearing was filed in the United States Court of Appeals for the Eighth Circuit and was granted. The court filed its opinion and judgment on rehearing June 27, 1957 (*Hyde v. Great Northern Railway Company,* 245 F. (2d) 537) and affirmed its original judgment. The court said in this opinion:

> "* * * Here we have an erroneous exercise of judicial discretion because the factual situation did not warrant the transfer of the case to the Northern District of California under Sec. 1404(a).

"* * *

"Here the District Judge has transferred a case for trial to a district in which it could have been brought, but to which, in our opinion, it could not properly have been transferred in view of the surrounding circumstances."

The defendant petitioned the United States Supreme Court for a writ of certiorari to review the decision of the Court of Appeals for the Eighth Circuit pursuant to a clear mandate from that court that such action be taken. The United States Supreme Court denied the petition for certiorari November 12, 1957.

The action was transferred to the United States District Court, Northern District of California, Southern Division, November 28, 1957. On January 6, 1958, defendant filed a notice of motion and supporting affidavits in the United States District Court, Northern District of California, Southern Division, for an order transferring the venue of the action to the United States District Court, Western District of Washington, Northern Division, for trial at Seattle. The United States District Court for the Northern District of California, Southern Division, filed its order and memorandum March 17, 1958, denying defendant's motion.

The review of this order is the subject matter of these prohibition and mandamus proceedings.

B. Defendant's Affidavits in Support of Motion to Transfer to Seattle, Washington.

Defendant's motion to transfer to Seattle was supported by several affidavits which set forth the following facts:

1. The accident occurred at Seattle, Washington, on November 5, 1955 (R. 16B).

2. The plaintiff at the time the accident occurred was a resident of Seattle (R. 16B).

3. Seattle is approximately 904 miles from San Francisco (R. 16B).

4. Nineteen persons having personal knowledge of the facts material to the action reside in Seattle, Washington (R. 16B - 23B).

5. Each of the nineteen persons will be necessary and material at the trial of the case and their testimony would be relevant to the issues involved (R. 23B).

6. That the testimony of each of the nineteen persons in deposition form would be extremely unsatisfactory, and that if their testimony would be produced in deposition form at the trial of this case at San Francisco the rights of the defendant would be seriously prejudiced in the eyes of the jury (R. 27B).

7. Each of the nineteen persons will be required to spend two and one-half additional days and three additional nights in additional travel time if the case were tried at San Francisco rather than Seattle (R. 23B).

8. Each of the nineteen persons would be required to spend an additional six days attending the trial at San Francisco rather than Seattle in additional travel time (R. 23B).

9. The defendant would be required to expend $4,057.10 additional expense if the case were tried in San Francisco rather than Seattle (R. 25B).

10. That seventeen of the necessary persons required at the trial are employees of the defendant (R. 25B).

11. Six medical specialists who treated the plaintiff from the date of the accident until January 30, 1956, reside and

practice medicine in the city of Seattle (R. 17B, 18B, 19B).

12. If the case were tried at a location other than Seattle, the court and jury would be deprived of an opportunity to view the scene where the accident occurred (R. 29B).

13. That if the case were transferred to Seattle, Washington, for trial, the defendant would arrange to have the case tried by its regular salaried company attorneys residing in the city of Seattle in contrast to the expense of having the action tried by a private firm of attorneys at San Francisco (R. 28B).

14. The spring term of court for the trial of jury cases at Seattle, Washington, will be held commencing the first Tuesday in May, 1958 (R. 30B).

15. Five of the six medical specialists who treated the plaintiff at Seattle, Washington, refuse to voluntarily appear for the trial of the case at San Francisco, and the sixth medical specialist states that it would be very inconvenient for him to attend the trial at San Francisco (R. 38B - 49B).

16. The three medical specialists who treated the plaintiff during his confinement in the Veterans Administration Hospital at Long Beach, California, refuse to voluntarily appear for the trial of this case at San Francisco (R. 50B - 55B).

17. There is daily nonstop air flights between Los Angeles and Seattle taking approximately three hours and forty-five minutes (R. 83B).

18. The plaintiff was confined in the Veterans Administration Hospital at Long Beach, California, from September 1, 1956, until April 10, 1957, and September 14, 1957, until September 18, 1957 (R. 85B).

19. The plaintiff is physically able to travel to Seattle, Washington, from Long Beach, California, in the opinion

of the medical specialists who treated the plaintiff at the Veterans Administration Hospital at Long Beach, California (R. 87B).

20. The necessary witnesses at the trial of this action residing in Seattle, Washington, and Long Beach, California, including the medical specialists who treated the plaintiff in these cities, are not subject to subpoena of the United States District Court for the Northern District of California, Southern Division.

C. Plaintiff's Affidavits in Opposition to Defendant's Motion to Transfer to Seattle, Washington.

Plaintiff's objections to the transfer to the United States District Court, Western District of Washington, Northern Division, sitting at Seattle, are:

1. The plaintiff is paralyzed from the ninth and tenth dorsal vertebra down (R. 61B).

2. Dr. Wolfgang W. Klemperer, one of six medical specialists who treated the plaintiff at Seattle, would be willing to go to San Francisco and testify at the trial of the case (R. 75B).

3. The plaintiff is presently a resident of a suburb of Long Beach, California (R. 63B).

4. It is difficult for the plaintiff to travel.

POINTS AND AUTHORITIES

I. Prohibition Is the Proper Remedy to Prohibit the United States District Court, Northern District of California, from Taking Any Further Action in the Proceeding and Mandamus Is the Proper Remedy to Direct the United States District Court, Northern District of California, to Enter an Order Transferring the Action to the United States District Court, Western District of Washington, Northern Division.

LaBuy v. Howes Leather Company, 352 U.S. 249, 77 S.Ct. 309, 1 L. Ed. (2) 290.

Shapiro v. Bonanza Hotel Co. (9 Cir.), 185 F. (2d) 777.

Chicago, R. I. & P. R. Co. v. Igoe (7 Cir.), 212 F. (2d) 378, Cert. Denied, 350 U.S. 822, 76 S.Ct. 49, 100 L. Ed. 735.

Ford Motor Co. v. Ryan (2 Cir.), 182 F. (2d) 329.

Wiren v. Laws (D.C.), 194 F. (2d) 873, Cert. Denied, 346 U.S. 938, 74 S.C. 378, 98 L. Ed. 426.

II. The Denial of the United States District Court, Northern District of California, to Transfer the Venue of the Action to the United States District Court, Western District of Washington, Northern Division, Is an Abuse of Judicial Discretion and Is Clearly Erroneous.

Chicago, R. I. & P. R. Co. v. Igoe (7 Cir.), 220 F. (2d) 299, Cert. Denied, 350 U.S. 822, 76 S.C. 49, 100 L. Ed. 735.

Nicol v. Koscinski (6 Cir.), 188 F. (2d) 537.

III. The United States District Court, Northern District of California, May Transfer the Venue of the Action Under

the Provisions of 28 U.S.C. 1404(a) to the United States District Court, Western District of Washington, Northern Division, Notwithstanding the Fact the Plaintiff Does Not Reside in Said District and Does Not Voluntarily Submit to Its Jurisdiction.

ARGUMENT

I.

Prohibition Is the Proper Remedy to Prohibit the United States District Court, Northern District of California, from Taking Any Further Action in the Proceeding and Mandamus Is the Proper Remedy to Direct the United States District Court, Northern District of California, to Enter an Order Transferring the Action to the United States District Court, Western District of Washington, Northern Division.

The authority of the Courts of Appeals to issue the writ of prohibition and writ of mandamus is found in Section 1651(a) of the Judicial Code, which provides that all courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. The historical use of writs of mandamus and prohibition directed by an appellate court to an inferior court has been to exert the revisory appellate power over the inferior court. The writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction. *Ex parte Peru* (1943), 318 U.S. 578, 583, 63 S. Ct. 793, 87 L. Ed. 1014. A further use of the writs, both at com-

mon law and in the federal courts, has been to compel an inferior court to exercise its authority when it is its duty to do so. *Bankers Life & Cas. Co. v. Holland* (1953), 346 U.S. 379, 98 L. Ed. 106, 74 S. Ct. 145.

The United States Supreme Court, in its recent decision in *LaBuy v. Howes Leather Company* (1957), 352 U.S. 249, 77 S. Ct. 309, 1 L. Ed. (2) 290, again reiterated the power of Courts of Appeals to issue writs of prohibition and mandamus under the All Writs Act, 28 U.S.C. 1651(a). The Supreme Court held that Courts of Appeals have the discretionary power to issue writs of mandamus to compel a District Court to vacate a nonappealable interlocutory order.

The *LaBuy case* arose from litigation involving two antitrust actions instituted in the Federal District Court. The District Court, contrary to the desires of the parties, entered its order under Rule 53(b) of the Federal Rules of Civil Procedure referring the case for trial before a master. The matter came before the Court of Appeals for the Seventh Circuit on petitions seeking writs of mandamus directing the court to vacate the nonappealable interlocutory order of reference. The Court of Appeals granted the writs and vacated the discretionary order notwithstanding the respondent's contention that the extraordinary writs under Section 1651(a) could not be used as a device for review of interlocutory orders in advance of final decision. The Supreme Court granted certiorari and affirmed the decision of the Court of Appeals for the Seventh Circuit.

The Supreme Court in its decision stated on page 255:

> "* * * The question of naked power [of the Courts of Appeals to issue writs of mandamus to review interlocutory orders] has long been settled by this Court. As late as *Roche v. Evaporated Milk Association,* 319 U.S. 21

(1943), Mr. Chief Justice Stone reviewed the decisions and, in considering the power of Courts of Appeals to issue writs of mandamus, the Court held that 'the common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court.' Id., at 25. The recodification of the All Writs Act in 1948, which consolidated old §§ 342 and 377 into the present § 1651(a), did not affect the power of the Courts of Appeals to issue writs of mandamus in aid of jurisdiction. See *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 382-383 (1953)."

The Court further stated on page 259:

"We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here."

Courts of Appeals for seven circuits have passed upon the instant question and have specifically held that prohibition and mandamus will lie to review an order entered under Section 1404(a). These decisions are in accord with the Supreme Court's opinion in the *LaBuy case* although rendered previous to that decision:

Ford Motor Co. v. Ryan (2 Cir.), 182 F. (2) 329.

Paramount Pictures v. Rodney (3 Cir.), 186 F. (2) 111.

Atlantic Coast Line R. Co. v. Davis (5 Cir.), 185 F. (2) 766.

Nicol v. Koscinski (6 Cir.), 188 F. (2) 537.

Chicago, R. I. & P. R. Co. v. Igoe (7 Cir.), 212 F. (2) 378, Cert. Denied, 350 U.S. 822, 76 S.Ct. 49, 100 L. Ed. 735

Wiren v. Laws (D.C.), 194 F. (2d) 873, Cert. Denied, 346 U.S. 938, 74 S.Ct. 378, 98 L. Ed. 426.

In addition to the above, this Court has held that it has the power to issue writs of prohibition and mandamus to review an order entered under Section 1404(a). *Shapiro v. Bonanza Hotel* (9 Cir.), 185 F. (2d) 777.

In that case the plaintiff sought review of an order denying a motion for a change of venue made under Section 1404(a) from the District Court for the District of Nevada to the District Court for the Southern District of California. The court treated the appeal as though it were a petition for a writ of mandamus. The court held that the writ of mandamus is an extraordinary remedy to be applied with caution, but that sufficient grounds existed in the case to issue the writ if it clearly appears that the District Court was in error.

Clearly prohibition and mandamus is the proper procedure since it is the only procedure to review the District Court's denial of defendant's motion to transfer the venue of this action to Seattle, Washington, under Section 1404(a). The injury to the defendant cannot be corrected by appeal from the order complained of since the order is interlocutory and not appealable. *Jiffy Lubricator, Inc. v. Stewart-Warner Company* (4 Cir.), 177 F. (2d) 360. The harmful effects of an erroneous trial court's determination of transfer given without immediate review cannot be rectified on an appeal from final judgment because it would then be necessary to show prejudicial error, an impossible task. Defendant will not be able to show that a different result would have been reached had the case been tried in the proper jurisdiction, to-wit, the Western District of Washington. Nor can the defendant recover the increased costs of trying its case in an

inconvenient form even though it wins on the merits since such damages would be the consequence of a judicial act. *Ford Motor Co. v. Ryan, supra.*

Mandamus is the only remedy whereby the statutory factors providing for the convenience of witnesses can be protected. Upon appeal from an adverse final judgment below, the inconvenience of the witnesses would be a moot question. The factors, convenience of parties and witnesses, must in their nature be reviewed before trial if at all. *Gulf Research and Development Company v. Leahy* (3 Cir.), 193 F. (2) 302, 305. Prohibition and mandamus are the proper and only remedies in the case at bar because appeal is clearly an inadequate remedy. *Hyde v. Great Northern Railway Company,* 238 F. (2) 852, 855.

II.

The Denial of the Transfer by the District Court for the Northern District of California to the Western District of Washington Is an Abuse of Discretion and Is Clearly Erroneous.

The Courts of Appeals who have reviewed an order for transfer by way of extraordinary writs under the All Writs Act have universally held that the issue on review is whether the District Court abused its discretion in ordering or failing to order the transfer. Was the order under review "so 'clearly erroneous' as to amount to an abuse of his discretion?" *Chicago, R. I. & P. R. Co. v. Igoe* (7 Cir.), 220 F. (2d) 299, Cert. Denied, 350 U.S. 822, 76 S.Ct. 49, 100 L. Ed. 735.

In the Sixth Circuit this rule was established in *Nicol v. Koscinski, supra,* where the court held on page 538:

> "Determination as to the greater convenience or inconvenience must rest within the sound judicial discretion of the district judge to whom the petition for change of venue is addressed, and his decision should not be set aside unless there is apparent an abuse of discretion."

The Supreme Court of the United States has held the scope of review of the order applying the doctrine of forum non conveniens was confined to whether or not the District Court abused its discretion. *Gulf Oil Corporation v. Gilbert,* 330 U.S. 501, 512, 67 S.Ct. 839, 91 L. Ed. 1055.

When the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been committed, a finding is "clearly erroneous" although there is some evidence to support it. *U. S. v. Gypsum Company,* 333 U. S. 364, 395, 68 S.Ct. 525, 92 L. Ed. 746.

In *Gulf Oil Corporation v. Gilbert, supra,* the Supreme Court, in reviewing an order under the doctrine of forum non conveniens, related the factors or criteria to be taken into consideration in determining whether or not the order of the District Judge was clearly erroneous and an abuse of judicial discretion. The court stated on pages 508 and 509:

> "Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case *easy, expeditious* and *inexpensive.* There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting

upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

"Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home." (Emphasis supplied.)

Factors under Section 1404(a) which demonstrate that a transfer should be made are concisely stated in *Chicago, R. I. & P. R. Co. v. Igoe, supra,* on page 304:

"* * * convenience of witnesses of both plaintiff and defendant; the ease of access to sources of proof; the availability of compulsory process to compel the attendance of unwilling witnesses; the smaller amount of expense required for willing witnesses; the availability of a view of the premises; the congestion of the District Court calendar in the * * * [district where the action was commenced]; that no controverted issue of fact depends upon any event that occurred in the * * * [district where the action was commenced]; and the burden of a jury trial should not be imposed upon the * * * [district where the action was commenced], an area which has no relation to the litigation."

There is no dispute concerning the facts on which defendant's motion is based. There is no person having knowl-

edge of any relevant facts concerning the happening of this accident who is located in the Northern District of California. All of the persons who will be necessary at the trial of this case reside in the city of Seattle, Washington, except three doctors who treated the plaintiff at Long Beach, California, who will not voluntarily appear for the trial of this case at San Francisco or Seattle. These three doctors are not subject to subpoena. All of the records which have any bearing on this lawsuit are located at Seattle. If this case is tried at San Francisco rather than Seattle, all of the witnesses from Seattle will be compelled to spend two and one-half additional days in additional travel time from Seattle and return and will be compelled to spend six additional days attending the trial of the case. Plaintiff's attorney conceded at the argument of the motion before Judge Carter that the plaintiff presently is physically able to travel to Seattle, Washington, for the trial of this case. The additional expense to the defendant if the case is tried at San Francisco is $4,057.10. The above facts clearly point out that the failure to transfer the action to the Western District of Washington was erroneous and an abuse of discretion of the United States District Court for the Northern District of California.

In *Chicago, R. I. & P. R. Co. v. Igoe, supra,* the court held under facts similar to the instant case that the District Court abused its discretion and was clearly erroneous in failing to order a transfer under Section 1404(a).

Abuse of discretion becomes evident also by reviewing Judge Carter's memorandum wherein he states:

> "Regardless of what the decision of this Court would have been had defendant's motion been made to this Court in the first instance, considerations of comity require that this Court should not review the decision made by the Minnesota court."

It is evident that Judge Carter failed to consider the factors enumerated in Section 1404(a) in considering defendant's motion for a transfer to Seattle and arbitrarily held that judicial comity and the rule of the "law of the case" required denial of defendant's motion.

Judicial comity and the rule of the "law of the case" did not prohibit the United States District Court, Northern District of California, from exercising its judicial power and discretion to transfer the action to Seattle, Washington, under Section 1404(a). Judicial comity is a principle whereby the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation but out of deference and respect. It is a courtesy and a gesture of good will. The United States Supreme Court in *Mast, Foos & Co. v. Stover Mfg. Co.,* 177 U.S. 485, 20 S.Ct. 708, 44 L. Ed. 856, states the rule of judicial comity in the federal courts on page 488:

> "Comity is not a rule of law, but one of practice, convenience and expediency. * * * its obligation is not imperative. * * * Comity persuades; but it does not command. * * * It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes in play and suggests an uniformity of ruling to avoid confusion, * * *. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other coordinate tribunals. Clearly it applies only to questions which have been actually decided, and which arose under the same facts."

The "law of the case" is a discretionary rule of practice. *Southern R. Co. v. Clift,* 260 U.S. 316, 43 S.Ct. 126, 67 L. Ed. 283. Mr. Justice Holmes in *Messenger v. Anderson,* 225 U.S. 436, 444, 32 S.Ct. 739, 56 L. Ed. 1152, defined the rule as follows:

> "In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."

It should further be pointed out that the "law of the case" rule has three exceptions, and when one or more of these exceptions is present the rule will not be followed. These exceptions are:

1. When there is a certainty the earlier ruling is erroneous.
2. When the succeeding judge concludes that the court has no jurisdiction.
3. When the application of the rule would work manifest injustice.

See *Davis v. Davis* (D.C.), 96 F. (2d) 512; *Universal Oil Products Co. v. Standard Oil Co.* (W.D. Mo.), 6 F. Supp. 37; *Plattner Implement Co. v. International Harvester Co.* (8 Cir.), 133 F. 376. The court stated on page 378 of the *International Harvester Co. case, supra,* in regard to the rule of comity and the "law of the case":

> "* * * by its terms [the rule] it permits the 'most cogent reasons', such as a certainty that a previous ruling was erroneous, that no conflict would arise and no injustice would result from disregarding it, to present exceptions to it."

Judge Carter, in denying defendant's motion to transfer the venue of this action to Seattle, did so on the basis of judicial comity and the rule of the "law of the case." In so doing the court failed "to dispose of the case according to the law and facts" and failed to follow its "own convictions" and "abdicated [its] individual judgment" contrary to the mandate of the United States Supreme Court in the *Mast case.* The court failed to consider the obvious error of the Minnesota District Court in its previous ruling and the manifest injustice of that rule on the defendant. See *Hyde v. Great Northern Railway Company, supra.*

The abdication of the court's individual judgment to a previous erroneous and unjust ruling and the failure to consider defendant's motion on the merits under the criteria set forth in Section 1404(a) was clearly erroneous and an abuse of judicial discretion. As indicated by this court at the oral argument on defendant's motion for leave to file its petition for writs of prohibition and mandamus in this action, Judge Carter was required to view defendant's transfer motion in the same prospective as if the motion had been originally made to that court.

III.

The United States District Court, Northern District of California, May Transfer the Venue of the Action Under the Provisions of 28 U.S.C. 1404(a) to the United States District Court, Western District of Washington, Northern Division, Notwithstanding the Fact the Plaintiff Does Not Reside in Said District and Does Not Voluntarily Submit to Its Jurisdiction.

The Federal Employers Liability Act provides that an action thereunder may, be brought where the plaintiff resides or the action arose or where the defendant is doing business when the action is commenced. These liberal venue provisions were inserted in 1910 (36 Stat. 291) to relieve plaintiffs who were previously unable to bring an action except in the often distant domicile of the defendant. *Cound v. Atchison, T. & S. F. Ry. Co.,* 173 F. 527. The venue provisions were designed for the benefit of the plaintiff. In 1948 Section 1404(a) was enacted and in 1949 the United States Supreme Court upheld the application of the section to actions under the Federal Employers Liability Act. *Ex parte Collett,* 337 U.S. 55, 69 S.Ct. 944, 93 L. Ed. 1207. Prior to the enactment of Section 1404(a) the United States Supreme Court adopted the doctrine of forum non conveniens. *Gulf Oil Corporation v. Gilbert, supra.* Section 1404(a) is the statutory enactment of this doctrine.

The liberal venue provisions afforded plaintiffs under the Federal Employers Liability Act from 1910 until the adoption of forum non conveniens in the federal courts in 1947 resulted in forum shopping on a large scale by plaintiffs in

search, not of more convenient adjudication, but of more generous verdicts, and courts in several larger cities found their dockets swollen by actions which occurred in far distant forums. (64 Harvard Law Review 1347, 1353) The plaintiffs, by choice of an inconvenient forum, would vex, harass and oppress the defendant by inflicting upon him expense or trouble not necessary to the plaintiff's own right to prosecute his remedy. *Gulf Oil Corporation v. Gilbert, supra.* The purpose in the adoption of forum non conveniens in the federal courts and its statutory counterpart, Section 1404(a), was clearly set forth in *Barnhart v. John B. Rogers Producing Company* (N. D. Ohio W. D.), 86 F. Supp. 595, 599:

> "It appears to the court that the motivating factors for the enactment of Section 1404(a) was to afford relief to the defendant by placing him on a footing of equality with the plaintiff in the selection of a forum for the trial of the case."

In view of the historical background of Section 1404(a), and the purpose for which it was enacted, the words "where it might have been brought" by necessity must connote a jurisdiction where the action may have been commenced in the first instance by the plaintiff. The mere fact that the plaintiff in the instant case is not a resident of the state of Washington and the judicial district of Washington does not preclude the United States District Court for the Northern District of California from transferring this action to that district. If the above-quoted provisions of Section 1404(a) were to be given a restricted meaning in the sense that an action could not be transferred to a division or district in which the plaintiff was not subject to the district court's jurisdiction, it would result in a district court only being empowered to tranfer an action on defendant's motion to a

division or district in which the plaintiff was a resident. In those situations in which the action was initially commenced in the jurisdiction where the plantiff resided no transfer would be available to the defendant under Section 1404(a). Such a restricted view of Section 1404(a) would render the section completely ineffective for the purpose for which it was enacted. "Might have been brought" refers to potential jurisdiction by necessity.

The following are citations of cases where various federal courts have transferred actions to other federal courts in jurisdictions where the plaintiff was not a resident and therefore was not subject to the jurisdiction of the court except as a result of the transfer order. In such cases the jurisdiction of the transferee court over the plaintiff is acquired through the transfer order and the fact that the transferor court had jurisdiction of the plaintiff at the time the transfer order was entered.

In Re Josephson (1 Cir.), 218 F. (2d) 174.

Anthony v. RKO Radio Pictures, 103 F. Supp. 56.

Andino v. The S. S. Claiborne, 148 F. Supp. 701.

Ayala v. A. H. Bull S. S. Company, 148 F. Supp. 703.

Hill v. Upper Mississippi Towing Corporation, 141 F. Supp. 692.

CONCLUSION

It is respectfully submitted that the petition for a writ of prohibition be granted prohibiting the United States District Court, Northern District of California, from taking any further action in the proceeding, and that a writ of mandamus be issued directing the United States District Court, Northern District of California to set aside its order dated March 17, 1958, and to enter an order transferring the venue of the action to the United States District Court, Western District of Washington, Northern Division, sitting at Seattle.

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